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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

TARLTON AND SON, INC. **and** **ROBERT MUNOZ, an Individual.**	**Cases 32-CA-119054** **32-CA-126896**

RESPONDENT TARLTON AND SON, INC.'S REPLY BRIEF TO CHARGING PARTY'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Respondent Tarlton and Son, Inc. files this Reply Brief to the Charging Party's Reply Brief in Support of Exceptions to the Decision of the Administrative Law Judge filed in Cases 32-CA-119054 and 32-CA-126896. While styled a Reply Brief, the Charging Party's brief responds to Tarlton's Exceptions and Brief in Support of Exceptions and will be referred to herein as the "Charging Party's Answering Brief."

I. INTRODUCTION

For the reasons set forth in Tarlton's Exceptions to the Administrative Law Judge's Decision and Supporting Brief in Support of Exceptions, the Board should vacate and reverse the ALJ's decision. Nothing in the Charging Party's Answering Brief compels a different result.

II. REPLY TO THE CHARGING PARTY'S ARGUMENT THAT THE BOARD'S DECISION IN MURPHY OIL IS THE CORRECT DECISION

The Charging Party repeats most if not all of the arguments made in the Charging Party's Brief in Support of the Charging Party's Exceptions to the Decision of the Administrative Law Judge ("Charging Party's Exceptions Brief"). Tarlton believes it has adequately replied to these arguments in Tarlton's Answering Brief to the Charging Party's Exceptions and Brief in Support of Exceptions ("Tarlton's Answering Brief to Charging Party's Exceptions Brief"), and will not endeavor to repeat them in this Reply Brief. Nonetheless, Tarlton briefly addresses the Charging Party's arguments as set forth below.

The Charging Party's contention that Tarlton did not provide any business justification for implementing the MAP is incorrect. Tarlton did provide evidence of a business justification for implementing the MAP and defended the MAP on this basis. Thus, Tarlton's President Tommy Tarlton, whose testimony was not contradicted, explained that he implemented the MAP because he did not want a long, drawn out process for resolving workplace disputes and, instead, he wanted a system like the grievance-arbitration procedure in the Tarlton's Carpenters Union agreements which resolved disputes quickly and efficiently. (Tr. pages 145-146). The Supreme Court in Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758 (2010), recognized that employers (like Tarlton) have legitimate and substantial business reasons for promulgating arbitration agreements that preclude class or collective litigation of claims because

such agreements reduce litigation costs and delays by providing informal, streamlined procedures and shield employers from the substantial liability that class actions pose, which are the same reasons Tarlton implemented the MAP.

The Charging Party's claims regarding California Labor Code § 98 and Labor Code § 1198.5 are irrelevant to the issues before the Board. Either the MAP violates Section 8(a)(1) or it doesn't, and it does not matter whether the MAP allegedly violates provisions of the California Labor Code.

In making the "effective vindication" argument (see Charging Party's Answering Brief, page 3)[1], the Charging Party misreads the impact of the Supreme Court's decision in American Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304 (2013), confuses the applicability of this doctrine, and cites no cases that support the Charging Party's argument. In Italian Colors, the Supreme Court refused to apply this doctrine, but stated that the result might be different if an arbitration provision required a plaintiff to pay "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." Id. at 2310-11. Here, the Charging Party cites no record evidence to support this "effective vindication" claim. Additionally, the "effective vindication" doctrine which permits the invalidation of an arbitration agreement when arbitration would prevent the effective vindication of a federal statute, does not extend to state statutes, the only statutes cited by the Charging Party. See, e.g., Ferguson v. Corinthian Colleges, Inc., 733 F.3d 928, 936 (9th Cir. 2013).

The Charging Party's argument that Tarlton purportedly allowed "employees to bring group claims or collective actions up to point of arbitration" is a basis for finding the MAP unlawful (see Charging Party's Answering Brief, pages 3-4) is irrelevant because this was not the basis for the MAP purportedly violating Section 8(a)(1) or the theory pursued by the General Counsel. This same argument was made by the Charging Party in the Charging Party's Exceptions Brief and was responded to in Tarlton's Answering Brief at pages 13-14.

The Charging Party's argument regarding purported "substantive rights" under provisions

[1] Tarlton notes that the Charging Party's argument is confusing because the Charging Party also claims that the "effective vindication" doctrine "does not fit employment claims.

of the California's Labor Code that only allow the California Labor Commissioner to impose penalties or enforces such rights is misguided. In Sonic-Calabasas A, Inc. v. Moreno, 57 Cal. 4th 1109 (2013), cited by the Charging Party, the California Supreme Court held that the fact that an arbitration supplants an administrative hearing under the California Labor Code could not be a basis for finding an arbitration agreement unlawful. The fact that certain rights under the Labor Code are "substantive rights" does not mean that an employee cannot be bound to an agreement requiring arbitration of the employee's disputes with his/her employer. And, the Charging Party has not cited to any record evidence or any provision of the MAP that prohibits the California Labor Commissioner from enforcing provisions of the Labor Code.

The Charging Party argues that the Board should decide whether the collective bargaining agreements between the Carpenters Union and Tarlton are covered by the FAA. See Charging Party's Answering Brief, page 4. This same argument was made by the Charging Party in the Charging Party's Exceptions Brief and is in the nature of an exception to the ALJ's Decision, and should be ignored for the reasons set forth in Tarlton's Answering Brief to the Charging Party's Exceptions Brief at page 19. Moreover, the lawfulness of the MAP as it applies to Tarlton's Carpenters represented employees is not dependent on whether collective bargaining agreements are covered by the FAA.

The Charging Party's argument that the MAP is not a "contract of employment" (see Charging Party's Answering Brief, p. 4) is irrelevant.[2] For the arbitration provision to be covered by the FAA, it only needs to be in a "contract evidencing a transaction affecting commerce." 9 U.S.C. § 2. Thus, whether the MAP is a contract of employment under California law is irrelevant. Moreover, as set forth in Tarlton's Answering Brief to the Charging Party's Exceptions at pages 7-8, the MAP is a contract covered by the FAA. For similar reasons, the Charging Party's argument that the "employment relationship" is not "a contract evidencing a transaction affecting interstate commerce" (see Charging Party's Answering Brief, page 4) is irrelevant. The determinative issue for FAA purposes is not the "employment relationship," but

[2] This argument was similar to that made by the Charging Party Exceptions Brief, it was implicitly rejected by the ALJ and is in the nature of an exception to the ALJ's Decision, and should be ignored.

whether the MAP constitutes such a contract.

The Charging Party's argument regarding the MAP's alleged "retroactivity" (see Charging Party's Answering Brief, page 4) is again an argument that was made by the Charging Party in the Charging Party's Exceptions Brief, and is in the nature of an exception to the ALJ's Decision, and should be ignored. See Tarlton's Answering Brief to the Charging Party's Exceptions Brief at page 10.

The Section 9(a)[3] argument (presumably) regarding Tartlon's Carpenters represented employees (see Charging Party's Answering Brief, pages 4-5) fails because the MAP is not contrary to the grievance procedure in the collective bargaining agreement, and the Charging Party cites no evidence to support this proposition. Moreover, as set forth in Tarlton's Exceptions Brief at pages 31-34, and at pages 5-7 of Tarlton's Reply Brief to the General Counsel's Brief in Answer to Respondent's Exceptions ("Tarlton's Reply Brief to General Counsel's Answering Brief")[4] at pages 7-10, Tarlton did not unilaterally implement and "force" the MAP on Tarlton's Carpenters represented employees; the Carpenters agreed to its implementation.

The Charging Party's argument regarding the MAP's alleged illegality due to its purportedly prohibiting employees from "engaging in strike activity, boycotting and other concerted activity" (see Charging Party's Answering Brief, p. 5) is another argument that was made by the Charging Party in the Charging Party's Exceptions Brief, and is in the nature of an exception to the ALJ's Decision, and should be ignored. See Tarlton's Answering Brief to the Charging Party's Exceptions Brief at pages 11 and 15. Additionally, the Charging Party does not cite to any record evidence that the MAP prohibits employees from engaging in the above activity.

The Charging Party argues that the MAP is unlawful because it purportedly "prohibits employees from obtaining equitable relief in the form of injunctive relief or declaratory relief or disgorgement of ill-gotten gains." See Charging Party's Answering Brief, pages 5-6. This

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[3] 29 U.S.C. § 159(a).

[4] The referenced brief is being filed concurrently with Tarlton's Reply Brief to the Charging Party's Answering Brief.

argument is a variant of the argument that was made by the Charging Party in the Charging Party's Exceptions Brief, and is again in the nature of an exception to the ALJ's Decision, and should be ignored. Moreover, the Charging Party provides no record evidence to support this argument and cannot do so because the MAP expressly states that "[n]o substantive remedies that otherwise would be available to you … in a court of law, however, will be forfeited by virtue of this agreement to use and be bound by the MAP." See ALJ Decision at page 5.

As to the Charging Party's argument regarding the "truck driver" (see Charging Party's Answering Brief, page 6) this issue was addressed in Tarlton's Answering Brief to the Charging Party's Exceptions Brief at page 6.

The Charging Party's argument regarding whether the FAA can "constitutionally be applied to arbitration" (see Charging Party's Answering Brief, page 6) has already been responded to by Tarlton in Tarlton's Answering Brief to the Charging Party's Exceptions Brief at pages 8-10.

III. REPLY TO THE CHARGING PARTY'S ARGUMENT REGARDING IMPLEMENTATION OF THE MAP FOR TARLTON'S CARPENTERS REPRESENTED EMPLOYEES

The Charging Party contends that the ALJ properly declined to "sort [out] the representation issue" regarding Tarlton's Carpenters represented employees. For the reasons set forth in Tarlton's Exceptions and Brief in Support of Exceptions to Administrative Law Judge's Decision, it was error for the ALJ to do so and the ALJ also erred in not finding that implementation of the MAP for Tarlton's Carpenters represented employees was lawful.

The Charging Party claims that Tony Canale did not agree to Tarlton's implementation of the MAP. (Charging Party's Answering Brief, p. 6) The Charging Party is wrong. Tommy Tarlton clearly testified that Canale assented and did not object to Tarlton's implementation of the MAP. (Tr. at p. 86, lines 6-10; Tr. at p. 140, lines 1-8). Incredibly, the Charging Party contends that what Canale really agreed to was a waiver of the union's right to bargain the MAP.

The Charging Party also claims that Tony Canale's statement was hearsay. (Charging Party's Answering Brief, p. 6) The Charging Party is wrong. Canale's statement was not hearsay for the reasons set forth in Tarlton's Exceptions Brief at pages 26-29. In particular, Canale's

statement was not offered to prove the truth of the matter asserted; instead, his words had legal significance regardless of their truth.

The Charging Party further contends that the Carpenters Union could not waive the alleged Section 7 rights of employees (presumably) to pursue class or collective actions. (Charging Party's Answering Brief, page 6) However, the Charging Party does not cite to any applicable Board or court precedent to support this proposition. The Charging Party's citation to NLRB v. Magnavox, 415 U.S. 322 (1974) is inapposite. In NLRB v. Magnavox, the Supreme Court, citing to Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956), recognized that Section 7 rights "in the economic area" could be waived through collective bargaining, but held that "a different rule should obtain where the rights of the employees to exercise their choice of a bargaining representative is involved-whether to have no bargaining representative, or to retain the present one, or to obtain a new one." Id. at 325. See also Fournelle v. NLRB, 670 F.2d 331, 337 (D.C. Cir. 1982) (rights in the economic area under Section 7 can be waived through collective bargaining); (Prudential Insurance Co. v. NLRB, 661 F.2d 398 (5th Cir. 1981)) (same).

The basis for finding that Section 7 protects employees' rights to pursue class or collective actions is that Section 7 purportedly protects employees "when they seek to improve their work conditions through resort to administrative and judicial forums." D. R. Horton, supra, slip op. at 2 citing Eastex, Inc. v. NLRB, 437 U.S. 556 (1978). Clearly, the purported right protected by Section 7 here is an "economic right" akin to the right to strike for better terms and conditions of employment, and is not a right that is not waivable because it affects employees' right to exercise their basic choice of bargaining representative. As such, the Carpenters Union could waive the rights of employees it represented to pursue class or collective actions.

For the reasons set forth in this Reply Brief and Tarlton's Answering Brief to the Charging Party's Exceptions and Brief in Support of Exceptions, the ALJ erred in not finding that Tarlton's implementation of the MAP for its Carpenters represented employees did not violate Section 8(a)(1).

IV. REPLY TO THE CHARGING PARTY'S ARGUMENT THAT THE ALJ CORRECTLY FOUND THAT TARLTON INDPENDENTLY VIOLATED SECTION 8(a)(1) BY ALLEGEDLY IMPLEMENTING THE MAP IN RESPONSE TO EMPLOYEES' ALLEGED PROTECTED CONCERTED ACTIVITIES

For the reasons set forth Tarlton's Brief in Support of Exceptions at pages 34-43, the ALJ erred in failing to find that Tarlton violated Section 8(a)(1) by purportedly implementing the MAP in response to the filing of the Munoz class action complaint. All the points raised by the Charging Party have been adequately addressed by Tarlton's Exceptions Brief. In support of this independent Section 8(a)(1) violation, the Charging Party relies solely on the timing of Tarlton's implementation of the MAP - that the MAP was implemented after the filing of the Munoz lawsuit. Because the Charging Party apparently believes that this Section 8(a)(1) violation is self evident, the Charging Party does not cite to any Board precedent finding a violation in similar circumstances. However, the mere timing of the MAP's promulgation is insufficient to support a conclusion that the MAP's implementation was unlawful or discriminatorily motivated. See, e.g., Spinning Mills, Inc., 194 NLRB 1175 (1972); Montgomery Ward & Co., 227 NLRB 1170, 1174 (1977) ("the timing of an otherwise valid rule's promulgation, to coincide with the start of organizational activities, standing alone, would be insufficient to establish its unlawfulness." (emphasis added)); Star-Brite Industries, Inc., 127 NLRB 1008, 1011 (1960).

For the reasons set forth in this Reply Brief and in Tarlton's Brief in Support of Exceptions, the ALJ erred in finding that Tarlton independently violated Section 8(a)(1) by implementing the MAP after the filing of the Munoz class action lawsuit.

V. REPLY TO THE CHARGING PARTY'S ARGUMENT THAT APPLICATION OF THE FAA VIOLATES THE FIRST AMENDMENT RIGHT OF ASSOCIATION

The Charging Party contends that the FAA cannot be used to "thwart the right of workers to associate through concerted activity." See Charging Party's Answering Brief, pages 8-9. While the First Amendment protects individuals' rights of association, the Charging Party cites no record evidence and does not explain how the MAP interferes with any purported First Amendment rights of Tarlton's employees. The MAP merely requires that employees arbitrate their disputes with Tarlton on an individual basis, and does not prohibit Tarlton's employees from

exercising their First Amendment associational rights.

VI. REPLY TO THE CHARGING PARTY'S ARGUMENT REGARDING THE REMEDY

The Charging Party contends that the ALJ's recommended remedy and order and proposed notice should be sustained. (Charging Party's Brief at pages 9-10). The Board, however, should reject them, for the reasons set forth in Tarlton's Brief in Support of Exceptions at pages 44-45, and for the reasons set forth in Tarlton's Reply Brief to General Counsel's Answering Brief at pages 7-10.

For some reason, the Charging Party claims erroneously that Tarlton did not address the remedy. However, Tartlon's Exceptions and Brief in Support of Exceptions addressed not only the ALJ's remedy, but also the ALJ's recommended order and proposed notice.

The Charging Party argues that the remedies sought in the Charging Party's Exceptions, but denied by the ALJ, should be granted by the Board. This contention is improperly made herein and should be disregarded for the reasons set forth in Tarlton's Answering Brief to the Charging Party's Exceptions Brief at pages 20-21. The remedies requested by the Charging Party in the Charging Party's Exceptions are "extraordinary" and the Charging Party cited no authority or record evidence to support such remedies. Likewise, the Charging Party's request regarding the Board's "mobile app" should be disregarded. The Charging Party did not make this request to the ALJ and it was not part of the Charging Party's Exceptions.

For the reasons set forth in this Reply Brief and those set forth in Tarlton's Exceptions and Brief in Support of Exceptions, the ALJ's recommended order and remedy and proposed notice should be rejected. Alternatively, if the Board sustains the ALJ's Section 8(a)(1) violations, the ALJ's recommended order and remedy and proposed noticed should be modified as set forth above.

VII. CONCLUSION

For the reasons set forth in this Reply Brief and in Tarlton and Son, Inc.'s Exceptions and Brief in Support of Exceptions to Administrative Law Judge's Decision, Tarlton respectfully requests that the Board sustain its exceptions to the Administrative Law Judge's Decision, vacate and reverse the ALJ's Decision, and/or modify the ALJ's findings, conclusions of law and recommended Remedy, recommended Order, and recommended Notice, accordingly.

Respectfully submitted,

DATED: April 21, 2015

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I am employed in the county of Los Angeles, State of California; I am over the age of 18 and not a party to the within action; my business address is Hill, Farrer & Burrill, LLP, 300 South Grand Avenue, 37th Floor, Los Angeles, California 90071-3147.

I hereby certify that on April 21, 2015, I filed the foregoing document described as: **RESPONDENT TARLTON AND SON, INC.'S REPLY BRIEF TO CHARGING PARTY'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** in Cases 32-CA-119054 and 32-CA-126896 via E-Filing.

I hereby certify that on April 21, 2015, I electronically mailed a copy of the foregoing document and caused a true copy thereof to be placed in a sealed envelope with postage thereon fully pre-paid and addressed to counsel for the other parties herein as follows:

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